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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 850

RAYBESTOS-MANHATTAN, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 76–79) is not yet reported.

JURISDICTION

The judgment of the court below was entered March 4, 1935 (R. 80). The petition for a writ of certiorari was filed April 6, 1935 (R. 94). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in the circumstances of this case, the consolidation plan followed by the corporations,

whereby under separate contracts of purchase providing for delivery of certificates of stock in the new corporation to the selling corporations or their orders the petitioner acquired the assets of two corporations, and issued stock therefor, on the order of the selling corporations, directly to the stockholders of the two corporations, involved a transfer subject to stamp tax under Section 800, Schedule A–3 of the Revenue Act of 1926.

STATUTE INVOLVED

The applicable statute is set forth in the Appendix (*infra*, pp. 12–13).

STATEMENT

The findings of fact of the Court of Claims (R. 66–75) may be summarized as follows:

The petitioner is a New Jersey corporation, organized in 1929, with a total authorized capital stock of 1,000,000 shares of common stock without par value, all of which are outstanding and have been issued as full-paid and nonassessable shares (R. 66). At the time of the incorporation of the petitioner and for many years prior thereto, three separate and distinct industrial corporations, namely, the Raybestos Company, a Connecticut corporation, the Manhattan Rubber Manufacturing Company, a New Jersey corporation, and the United States Asbestos Company, a Pennsylvania corporation, existed and were doing business, and each was owned, controlled and operated by en-

tirely distinct and different interests, stockholders and directors, and none had any interest, direct or indirect, in the business, assets or properties of the others (R. 66). A summary of the general character of each of the corporations, their assets and business, is set forth at pages 66–68 of the Record.

On May 14, 1929, the Raybestos Company, the Manhattan Rubber Manufacturing Company, and the United States Asbestos Company entered into a written agreement, signed by the president of each company respectively, subject to the necessary action by directors and stockholders, which provided for the formation of a consolidated company to acquire all the assets of each of the three companies (R. 68). The agreement provided for the capitalization of the consolidated company and for the basis of the issuance of its stock for or in replacement of stock of the three existing companies (R. 68–69). A memorandum of the agreement appears in the Record at pages 6–9.

The directors of each corporation approved the agreement at directors' meetings held by the separate corporations for that specific purpose, and thereafter the agreements as approved at these meetings were submitted to the stockholders of the corporations for approval or rejection (R. 70). The submission to stockholders was done by means of form letters mailed to holders of common stock of the corporations, enclosing copies of a "Plan

and Agreement", dated May 22, 1929, as applicable to each set of stockholders (R. 70). The letters and the "Plan and Agreement" provided that the new consolidated company would acquire all the assets and liabilities of the three existing companies, and provided for the deposit of stock by the stockholders as an assent to the "Plan and Agreement", and provided that when all the terms and conditions of the "Plan and Agreement" were complied with "depositors will be entitled to receive, upon the consummation of the plan, and upon surrender of their certificates of deposit, the stock and scrip for fractions of shares of stock, of the New Company (but only as and when issued and ready for delivery) to which they shall be entitled pursuant to the terms and provisions of the plan and this agreement" (R. 70–71). Copies of the letters sent to stockholders and the enclosures appear at pages 9–60 of the Record.

All the stockholders of each of the corporations approved the consummation of the plan as submitted, and each stockholder deposited his stock certificate or certificates with the appropriate depositary pursuant to the terms and conditions set forth in the "Plan and Agreement" dated May 22, 1929 (R. 71–72).

The petitioner was organized under the laws of the State of New Jersey on July 5, 1929, and acquired the entire business and assets of the three companies (R. 72–73). The acquisition of the business and assets of the Manhattan Rubber Man-

ufacturing Company was accomplished pursuant to a merger of the petitioner and the Manhattan Rubber Manufacturing Company, effected under the provisions of the General Corporation Act of the State of New Jersey as amended (R. 72). The petitioner issued ratably and directly to the individual owners of 200,000 shares of the Manhattan Rubber Manufacturing Company common stock, in replacement of their stock interests, 250,000 shares of the petitioner's stock (R. 72).

The entire property of the Raybestos Company was acquired by proper deeds, assignments, bills of sale, and other instruments executed and delivered by the Raybestos Company (R. 72–73). The petitioner issued directly to the stockholders of the Raybestos Company 267,012 shares of the petitioner's stock in the proportion of 2.25 shares for each share of stock owned in the Raybestos Company. (R. 73). The transactions were all in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and pursuant to a contract entered into between the petitioner and the Raybestos Company dated September 9, 1929 (R. 73). The contract of September 9, 1929, provided that the Raybestos Company would transfer to the petitioner all its assets, business, and goodwill, and in exchange, that the petitioner would deliver 267,012 shares of its common stock "to the company or upon its order" (R. 73). A copy of the last-named contract appears in the Record at pages 80–86.

The petitioner acquired the entire assets of the United States Asbestos Company by means of proper deeds, assignments, bills of sale, and other instruments executed and delivered by the United States Asbestos Company in exchange for 114,000 shares of stock of the petitioner, issued directly to the stockholders of the United States Asbestos Company in the proportion of 1.14 shares for each share of stock owned in the United States Asbestos Company (R. 73–74). The transactions were all in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and a contract entered into between the petitioner and the United States Asbestos Company dated September 9, 1929 (R. 74). The contract of September 9, 1929, contained the same provisions, as adapted to the United States Asbestos Company, as the contract with the Raybestos Company appearing at pages 80–86 of the Record (R. 74).

On October 13, 1932, the petitioner was notified by the Bureau of Internal Revenue that it was subject to a transfer tax of two cents a share under schedule A–3 of section 800 of the Revenue Act of 1926 on the number of shares of its capital stock issued as the consideration for the assets acquired from the Raybestos Company and the United States Asbestos Company, in the amount of $7,620.24 (R. 74). The petitioner paid the tax, together with interest of $165.11, making a total of $7,785.35, under protest on May 8, 1933 (R. 74). On May 15, 1933, the petitioner filed a claim for refund of

the tax and interest on the ground that in the circumstances involved there was no real transfer of a corporate interest or right to acquire it, and that the tax did not attach (R. 74–75). The Commissioner rejected this claim on December 12, 1933 (R. 75).

The petitioner paid a tax of five cents a share on each original issue of its stock, which, it is conceded, was legally imposed (R. 75).

The United States Asbestos Company was dissolved on September 27, 1930, but the dissolution was not made immediately because of pending litigation (R. 75). The Raybestos Company has not been dissolved but has continued in existence because of patent rights which are not assignable (R. 75). The Manhattan Rubber Manufacturing Company lost its identity by merging with the petitioner (R. 75).

The court below dismissed the petition (R. 80).

ARGUMENT

The court below has sustained the imposition of a stamp tax in this case on the ground that the Raybestos Company and the United States Asbestos Company transferred to their stockholders the right to receive the shares of petitioner under the plan of consolidation and agreements in connection therewith. The petitioner contends that no such tax could attach because the consolidating corporations never had the right to receive the petitioner's stock.

We submit that the decision of the court below is correct both in its reasoning and result, and that there is no direct conflict of authority. As pointed out by the court below, the statute is designed to raise revenue and is broad in its terms. Its comprehensive reach is accentuated by the specific exemptions granted in it. If the present transaction involved in substance the transfer by the consolidating corporations of a right to receive the shares of the petitioner, we submit that the tax properly attached although the shares were issued directly to the shareholders of the consolidating companies. In the circumstances of this case we think it is clear that each consolidating company had such a right and transferred it to its shareholders. The final contract of each corporation with the petitioner provided that the petitioner would, in exchange for the assets of each corporation, deliver its stock "to the company or upon its order" (R. 73). The contract thus recognized that the consolidating corporations were entitled to the consideration for the transfer of their assets, and the issuance of the petitioner's stock directly to their stockholders was therefore made on the order of the consolidating corporations. We submit that such an order clearly involved the transfer of the right to receive the stock and was subject to the tax.

The conclusion of the court below is supported by the well established principle that there is a substantial difference between a corporation and its stockholders, and that the ownership of the

corporate property is in the corporation and not the stockholders. See *Gibbons* v. *Mahon*, 136 U. S. 549, 557; *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 442. As applicable here, the principle makes it clear that the consolidating corporations, as distinguished from their shareholders, alone could convey the assets and become entitled to receive the consideration in the form of shares in the petitioner corporation. The stockholders received the stock only as a result of the transfer to them of the right to receive it. That transfer, we submit, is taxable. *Marconi Wireless Telegraph Co.* v. *Duffy*, 273 Fed. 197 (N. J.); *Consolidated Equities, Inc.* v. *White*, 9 F. Supp. 145 (Mass.).[1]

The petitioner cites only two cases from Circuit Courts of Appeals, which under Rule 38, par. 5(b) of this Court, could be considered as creating a conflict of authority. *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl*, 63 F. (2d) 202 (C. C. A. 5th); *MacLaughlin* v. *Westmoreland Coal Co.*, 73 F. (2d) 1004 (C. C. A. (3rd), affirming 8 F. Supp. 963 (E. D. Pa.) on opinion below. We of course do not support the result reached in either of those cases. We believe that a proper application of the rule for which we contend would have resulted in a decision in favor of the tax in the

[1] The Treasury Regulations have not provided for the instant case, but other rulings of the Bureau of Internal Revenue indicate a practice of taxing a transfer in such a transaction as this. Reg. 71, Art. 34; G. C. M. 7542, IX–1 Cumulative Bulletin 392; G. C. M. 11904, XII–1 Cumulative Bulletin 434.

circumstances presented in each of those cases, and, in our view, the imposition of the tax should not be rendered improper by a formal change in the procedure of accomplishing substantially the same result. However, we submit that the two cases are readily distinguishable from the case at bar. Both differ from the present case in that a change of domicile of one corporation was the only objective there, while, here, three corporations combined, each contributing assets, and produced an enlarged and greatly altered enterprise. The reasoning of the opinion in *Shreveport-El Dorado Pipe Line Co.* v. *McGrawl, supra,* establishes the basis for this distinction, for there the court held that Congress did not intend to impose the tax where there was no real transfer of a corporate interest, each stockholder after the transaction owning substantially the same corporate interest he owned before. In *MacLaughlin* v. *Westmoreland Coal Co., supra,* the ruling was made to depend upon the construction of the agreement between the old and the new corporation, the court concluding that, under the agreement, the old corporation never had a vested right to receive the shares of the new corporation but that the right was given in the first instance to the shareholders. Neither of the cases can be said to be in direct conflict with the case at bar. Certain District Courts have distinguished the cases and sustained the stamp tax in similar circumstances. *George A. Hormel & Co.* v. *United States,*

printed in 1935 Prentice Hall, Vol. I, p. 1053 (Minn.); *United States* v. *Brown Fence & Wire Co.* (N. D. Ohio), printed in 1935 Prentice Hall, Vol. I, p. 745; *Consolidated Equities, Inc.* v. *White, supra.*

CONCLUSION

Although the principle involved in the case at bar presents a question of importance in the administration of the stamp tax, we feel justified in opposing the petition in the instant case on the ground that the decision below is clearly correct and that there is no direct conflict of authority. We submit, therefore, that the petition should be denied.

Respectfully submitted.

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MAY 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

* * * * *

SCHEDULE A—STAMP TAXES

* * * * *

3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or

shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided,* That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further,* That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: * * * (U. S. C. App., Title 26, Sec. 901.)

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